(1)

Supreme Court U.S
F I L E D

001870 JUN - 6 2001

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

Gary Fuller, *Petitioner*

v.

Lincoln University et al., *Respondents*

The U.S. House of Representatives, Committee On the Judiciary, issued an intervening Opinion relative to this case, __Cong. Rec. __, (September 26, 2000) (Opinion delivered by Chairman Henry J. Hyde).

The National Chapter of the Coalition For Justice For All (CFJFA) participated in this case before the district court as *amicus curiae* in support of petitioner.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Respectfully Submitted By: Gary Fuller
728 Glendale Drive, Jefferson City, MO 65109
(573) 636-7472

MTP

QUESTIONS PRESENTED

1. The **U.S. House of Representatives, Committee on the Judiciary** issued an intervening Opinion relative to this case holding that district courts do not have the discretion under the Constitution to refuse to rule on properly raised pretrial motions. The court of appeals held otherwise and summarily affirmed the district court. Thus, the question is whether or not district courts have the discretion to refuse to rule on pretrial motions?

2. Does a litigant who pays the court docketing fee and properly invokes the jurisdiction of the district court have a constitutional right to a ruling on his pretrial motions under the Fifth Amendment's Due Process Clause.

3. Whether or not the district court violated the Fifth Amendment Due Process Clause guarantee of a fair trial by refusing to rule on or consider petitioner's critical pretrial motions and proceeding to trial nonetheless.

4. Whether or not federal courts may ignore congress's expressed intent on an issue and substitute its own judgment instead, especially here, where Congress has opined on the very matter before the Court?

PARTIES TO THE PROCEEDING

Gary Fuller, *Petitoner*
728 Glendale Drive
Jefferson City, Mo. 65109

Lincoln University, &
Board of Curators of L.U., *Respondents*

The **United States House of Representatives, Committee on the Judiciary**, issued an intervening Opinion relative to this matter

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The National Coalition For Justice For All (CFJFA) participated in this case as *amicus curiae* in support of plaintiff, urging that the district court follow the Opinion of the House Judiciary Committee

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TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS.....vii

TABLE OF AUTHORITIES.....iv

OPINIONS BELOW.....x

JURISDICTION.....x

CONSTITUTIONAL PROVISIONS INVOLVED...xi

STATEMENT OF THE CASE.....1

ARGUMENT FOR GRANTING THE WRIT...5

Argument I

The House Judiciary Committee personally invested time and resources in reviewing and opining on the very matter before this Court, and thus it merits review by this Court.....8

Argument II

The District Court's refusal to rule on petitioner's pretrial motions violated petitioner's right to a fair trial under the Due Process Clause of the Fifth Amendment 9

Argument III

The Appellate Court Grossly Erred in its Disposition of Petitioner's Rule 60(b) Motion in Light of the House Judiciary Committee's Intervening Opinion.....11

Argument IV

Federal Courts Generally Accord Wide Deference to the Expressed Intent Congress and the Lower Courts Erred by Not Doing So in this Case.....15

CONCLUSION.....16

APPENDIX

Appendix A

Congressman Ike Skelton's confirmance of submission of matter to the U.S. House of Representatives, Committee on the Judiciary, 9/14/2000.....1a

Appendix B

Official memorandum from Congressman Skelton to Congressman Henry J. Hyde, Chairman of the House Judiciary Committee concerning this matter, 9/14/2000.....2a

Appendix C

Opinion of the House Judiciary Committee on the issue in this case, 9/26/2000.....3a

Appendix D
Follow-up letter from Congressman Skelton confirming consideration by the House Judiciary Committee, 2/15/2001.....4a

Appendix E
District Court Order permitting the National Coalition For Justice For All to participate in this case as Amicus Curiae, 3/09/2001.....5a

Appendix F
Eighth Circuit Opinion, 3/12/2001.....6a

Appendix G
District Court Order Denying Petitioner' Rule 60(b) Motion, 1/23/2001....7a

Appendix H
Petitioner's Rule 60(b) Motion.....9a

Appendix I
Previous 8th Circuit Opinion, 8/14/2000...20a

Appendix J
Petitioner's unajudicated Motion to Compel respondents to produce documents.....21aa

Appendix K
Petitioner's unajudicated Motion to Strike relitigation of dismissed counts.....33a

Appendix L
Petitioner's unadjudicated Motion to Exclude...36a

Appendix M
A Partial Copy of the District Court Docket Pertinent to this case.....43a

TABLE OF AUTHORITIES

Cases

Ellison v. Ford Motor Co., 847 F.2d 297, 300-01 (6th Cir.1988).....14

Export Group v. Reef Industries, Inc., 54 F.3d 1466, 1469 (9th Cir. 1995)...11

Government Fin. Servs. One Ltd. Partnership v. Peyton Place, Inc., 62 F.3d 767, 773 (5th Cir. 1995)....14

Green v. Bock Laundry Machine Co., 490 U.S. 504 (1989).....10

Harrell v. DCS Equip. Leasing Corp., 951 F.2d 1453 (5th Cir. 1992)....14

Hickman v. Taylor, 329 U.S. 495 (1947).....10

In re Complaint of Bankers Trust Co., 752 F.2d 874, 890 (3d Cir. 1985)...13

In re School Asbestos Litig., 977 F.2d 764 (3d Cir.1992).....14

Klapprott v. United States, 335 U.S. 601, 609 (1949)...13

Lisenba v. California, 314 U.S. 219 (1941).....10

Massiah v. United States, 377 U.S. 201, 204, 12 L. Ed. 2d 246, 84 S. Ct. 1199 (1964).....10

Mathews v. Eldridge, 424 U.S. 319, 333 (1976)...13

McDonnell Douglas Corp. v. Polin, 429 F.2d 30, (3d Cir.1970).....15

Miller v. Hambrick , 905 F.2d 259, 262 (9th Cir. 1990)..15

New Orleans v. Dukes, 427 U.S. 297, 303 (1976)...16

Schwab v. Bullock's, Inc., 508 F.2d 353, 355-56 (9th Cir. 1974)...11

Thompson v. Madison County Bd. of Educ., 476 F.2d 676, 678 (5th Cir. 1973)...13

Turner Broad Sys. Inc. v. FCC, 512 U.S. 622, 665 (1994) (Kennedy, J. Op.))...16

United States v. Indoor Cultivation Equip. from High Tech Indoor Garden Supply, 55 F.3d 1311, 1316 (7th Cir. 1995)..11,12

United States v. Proctor & Gamble, 356 U.S. 677, (1958).....10,11

V.T.A., Inc. v. Airco, Inc., 597 F.2d 220, 224 n.8 (10th Cir. 1979)...12

OTHER AUTHORITIES

U.S. Const. Amend. 5.....9,10,11,16

Intervening Opinion of the U.S. House of Representatives, Committee on the Judiciary....2-5, 9,12,15,16,17

Rule 60(b).....11, 12, 13, 14

OPINIONS BELOW

The unpublished opinion of the court of appeals on review dated March 12, 2001 is located in Appendix F at 6a.

The Order of the District Court denying petitioner's Rule 60(b) motion to reopen the case is located in Appendix G at 7a.

The intervening Opinion of the U.S. House of Representatives, Committee on the Judiciary regarding to the matter brought before this Court is located in Appendix C at 3a.

Because the district court refused to rule on petitioner's motion compelling respondents to produce documents (Appendix J at 21a), motion to strike relitigation of dismissed counts (Appendix K at 33a), and motion to exclude (Appendix L at 36a), no order addressing those motions exists.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1254(1) to review the appellate court's final judgment entered March 12, 2001 (Appendix F at 6a). The petition is filed within 90 days of the judgment, therefore this Court has jurisdiction to review this case.

CONSTITUTIONAL PROVISIONS AND PERTINENT LAW INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person . . . [shall] be deprived of life, liberty, or property without due process of law [.]"

STATEMENT OF CASE

On September 23, 1995 petitioner filed a discrimination lawsuit against Lincoln University pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000(d) alleging that the respondents had discriminatorily canceled his enrollment. On January 7, 1998 the district court granted summary judgment to respondents. On November 17, 1998, the United States Court of Appeals for the Eighth Circuit reversed the district Court's judgment, and remanded the case for further proceedings and trial. (See generally *Fuller v. Rayburn I*, 161 F.3d 516 (8th Cir.1998).

The District Court's Refusal to Rule on Petitioner's Pretrial Motions

On remand, the petitioner filed the following pretrial motions:

- Motion to Compel Production of Documents (App. J at 21a)
- Motion to Exclude (App. L at 36a)
- Motion to Strike (App. K at 33a)

As evidenced by the trial docket (App. M at 43a), the district court refused to rule on the motions, and forced the case to trial nonetheless. The district court further refused to rule on petitioner's motion to exclude even at trial.

Respondents did not produce any documents during the entire case, and did not contest such for purposes of the appeal. In fact, respondents did not oppose the issue or facts of petitioner's rule 60(b) motion as relevant here.

After denying petitioner crucial discovery material, resulting from the district court's refusal to rule on petitioner's motion to compel, the respondents prevailed at trial.

The petitioner appealed the judgment to the Eighth Circuit Court of Appeals. The Court of Appeals affirmed without considering or holding on the district court's refusal to rule on petitioner's motions. (App. I at 20a)

The intervening Opinion of the U.S. House of Representatives, Committee on the Judiciary

After the Court of Appeals failed to address the district court's refusal to rule on petitioner's motions, the petitioner brought this matter fully before the U.S. House of Representatives, Committee on the Judiciary. (App. A atA1, App. B at A2, App. D at A4).

This matter, itself, was taken before the House Judiciary Committee by Congressman Ike Skelton. (App. A atA1, App. B at A2, App. D at A4).

The Committee, after 12 days deliberation, felt compelled to respond because of the circumstances of this case and issued an intervening published opinion authored and delivered by Chairman Henry J. Hyde on behalf of the Committee. (App. C at A3)

The Opinion held contrary to the lower courts' implicit holding. (App. C at A3). The Committee unequivocally held that a district court does not have the option or discretion under the Constitution to refuse to rule on properly raised pretrial motions properly brought before it, and that its refusal to do so cannot be considered a discretionary act. (App. C at A3).

Rule 60(b) Motion

The petitioner subsequently filed a Rule 60(b)(4) and Rule 60(b)(6) motion to vacate the judgment on the grounds that it was void because the district court's refusal to rule on petitioner's pretrial motions violated petitioner's constitutional due process rights to a fair trial afforded under the Fifth Amendment of the United States Constitution, and also that the district court grossly abused its discretion in refusing to rule on petitioner's pretrial motions. (App. H at 9a).

The respondents did not oppose the motion or facts therein. Neither the respondents nor the district court disputed the facts presented in the motion.

The National Chapter of the Coalition For Justice For All (CFJFA) participated as amicus curiae and argued in support of petitioner, urging the district court to follow the Opinion of the House Judiciary Committee and vacate its prior judgment. (App. E at 5a).

The District Court denied the Rule 60(b) motion without addressing the issues it raised. (App. G at 7a-8a). The district court also denied relief on its belief that Court of Appeals prior mandate had decided the issue. (App. G at 8a).

To the contrary, the Court of Appeals prior one-page decision is devoid of any consideration of the issue concerning district court's refusal to rule on motions. (App. I at 20a-21a), which is the very disposition that presumably troubled the House Committee on the Judiciary.

Now this Case is before this Court, to settle the conflict between House Committee of the Judiciary and the lower courts in this matter.

REASONS FOR GRANTING THE WRIT

A. The House Judiciary Committee's interest in this matter shows in, and of itself, why this Court's review is warranted.

The issue and events in this case were so impetuous as to command the attention of the House Judiciary Committee. Petitioner respectfully asserts that This Court, should review the same.

Indeed, it is well settled that "When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution. This has been clear from the early days of the Republic." *City of Boerne v. Flores,* 117 S. Ct. 2171 (1997).

B. Furthermore, The Court of Appeals summary affirmance of the district court's refusal to rule on pretrial motions directly conflicts with the intervening Opinion of U.S. House of Representatives, Committee on the Judiciary in this case. Therefore, review and reversal by this Court is warranted.

The House Judiciary Committee has personally expressed its intent in this case. It has addressed the very issue on disposition and has opined contrary to

the lower court's affirmance of the district court's refusal to rule on pretrial motions.

The issue in this case is so important to orderly procedural practice that the U.S. House of Representatives, Committee on the Judiciary, was compelled to render an Opinion upon the issue raised in this matter. This case was brought before this Court with the graces of Congress itself, for review by this Court.

The Court of Appeals, in order to evade reversal of the judgment of the district court, simply refused to address the issue at any time in this case, both on direct appeal of the case, and on appeal of the denial of petitioner's subsequent Rule 60(b) motion asserting the same grounds as decided by the Committee. The Court of Appeals completely disregarded the Committee's decree by summarily affirming the denial of petitioner's Rule 60(b) motion for relief from judgment.

There exists a unresolved conflict between United States House of Representatives, Committee on the Judiciary, and the Court of Appeals concerning the limits of judicial discretion pertaining to the responsibility of a district judge to rule on motions properly submitted before his Court. This conflict no doubt calls for either new legislation, or more appropriately a precedent by this Court. The question is simple and direct: do litigants generally have the

right to at least rulings on their pretrial motions, or does the district court have the unfettered discretion to refuse to rule at all on pretrial motions of any kind?

As the appellate court's upholding of the district court's refusal to rule on motions is contrary to the intent of Congress as expressed by the Opinion of the U.S. House of Representatives, Committee on the Judiciary, this Court should decide this conflict once and for all, and establish precedent and guidelines for future cases no doubt involving the same issues.

D. Furthermore, The Constitutional Issue Raised Remains Unsettled Among the Federal Judiciary and is of First Impression Before This Court

The critical constitutional question raised by this Petition presents an unsettled issue of whether the Fifth Amendment's guarantee to fundamental fairness in judicial proceedings is violated when the district court refuses to rule on properly presented pretrial motions is of vital importance to all litigants as well as our system of justice.

There is no case law or precedental guidance from this Court addressing whether or not district courts, as a matter of course, may entirely refuse to rule on or consider pretrial discovery motions, and whether or not that refusal violates the Fifth Amendment's Due Process Clause which guarantees litigants both a fair trial and fundamental fairness in judicial proceedings.

Allowing district courts submit cases to a jury after refusing to rule on or consider crucial pretrial discovery motions works a drastic change in the Due Process Clause of the Fifth Amendment that has repercussions far beyond this case alone.

Such a change would adversely affect the outcome of trials, deprive litigants of the fundamental fairness that the Fifth Amendment Due Process Clause affords, and increase piecemeal appeals at a staggering rate, and is further not in accord with the intentions of Congress as expressed by the Opinion of the House of Representatives Judiciary Committee.

ARGUMENT I.

The House Judiciary Committee personally invested time and resources in reviewing and opining on the very matter before this Court, and thus it merits review by this Court

The House Judiciary Committee deemed the issue in this case so significant as to warrant its review, and this Court should do the same. The district court refused to rule on petitioner's pretrial motions and the Court of Appeals summarily affirmed its judgment without even commenting on the district court's refusal to rule, both on direct appeal and subsequent appeal of the Rule 60(b) motion.

The House Judiciary Committee, in light of the actions of the lower courts, felt compelled to review

the matter, and after 12 days deliberation it issued an opinion against the refusal to rule on pretrial motions. This issue has never been squarely decided by this Court, and now is the time it may be done.

The practice of district judges refusing to rule on pretrial motions needs to be addressed. the House Judiciary Committee opined that a district judge does not generally have the discretion or *option* to refuse to rule on a motion properly brought before it. The Court of Appeals disagreed and summarily affirmed, without comment, the refusal of the district court to rule on petitioner's pretrial motions.

This Court should not only resolve this conflict, but also decide the constitutionality of the practice of refusing to rule on motions in light of the Due Process Clause of Fifth Amendment.

The House Judiciary Committee's Opinion and intervention should be significant enough to warrant this Court's review.

ARGUMENT II.

The District Court's refusal to rule on petitioner's pretrial motions violated petitioner's right to a fair trial under the Due Process Clause of the Fifth Amendment.

The Fifth Amendment to the United States Constitution provides:

> "No person . . . [shall] be deprived of life, liberty, or property without due process of law [.]"

Accordingly, civil litigants in federal court share equally the protections of the Fifth Amendment's Due Process Clause. See generally: *Green v. Bock Laundry Machine Co.,* 490 U.S. 504 (1989).

Under our system of justice the most elemental concepts of due process of law contemplate that a trial be conducted, "in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law." *Massiah v. United States,* 377 U.S. 201, 204, 12 L. Ed. 2d 246, 84 S. Ct. 1199 (1964).

Due process guarantees that petitioner will be afforded "that fundamental fairness essential to the very concept of Justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." *Lisenba v. California,* 314 U.S. 219, 236 (1941).

In line with the Fifth Amendment guarantee of fundamental fairness, the purpose discovery rules is to provide for the "fullest possible" pre-trial disclosure of admissible evidence, to "reduc[e] the possibility of surprise," *Hickman v. Taylor,* 329 U.S. 495, 500-01 (1947), and to insure "a fair contest," *United States v.*

Proctor & Gamble, 356 U.S. 677, 682 (1958). In this case the district court neither ruled on petitioner's motion to compel production of documents, nor did it make any findings as to whether or not respondents produced any documents during the entirety of this case.

Argument III

The Appellate Court Grossly Erred in its Disposition of Petitioner's Rule 60(b) Motion in Light of the House Judiciary Committee's Intervening Opinion

Petitioner contests a denial of his Rule 60(b) motion in this case. Rule 60(b) motions are remedial in nature and therefore must be liberally applied. *Schwab v. Bullock's,Inc.*, 508 F.2d 353, 355-56 (9th Cir. 1974).

A. Rule 60(b)(4)

Federal courts "review de novo . . . . a district court's ruling upon a Rule 60(b)(4) motion to set aside a judgment as void, because the question of the validity of a judgment is a legal one." *Export Group v. Reef Industries, Inc.*, 54 F.3d 1466, 1469 (9th Cir. 1995).

Under Fed.R.Civ.P. 60(b)(4) a judgment is void and should be vacated when the Court which rendered it acted inconsistent with Due Process of law. *United States v. Indoor Cultivation Equip. from High Tech Indoor*

Garden Supply, 55 F.3d 1311, 1316 (7th Cir. 1995) (citations omitted). Furthermore, when Rule 60(b)(4) is applicable, "relief is not a discretionary matter; it is mandatory." *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224 n.8 (10th Cir. 1979). "If the underlying judgment is void, it is a per se abuse of discretion for a district court to deny a movant's motion to vacate the judgment under Rule 60(b)(4)." *Indoor Cultivation Equipment*, 55 F.3d at 1317.

The district court's refusal to rule on petitioner's motion to compel, along with respondents refusal to produce documents at any time in this case made the trial, with respect to petitioner, "more a . . . trial by ordeal than a disciplined contest." *United States v. Augenblick*, 393 U.S. 348, 356 (1969).

The district court's refusal to rule on petitioner's motion to compel production of documents was not only error but also prejudiced petitioner because petitioner received no documents during the entirety of the case and was unaware of the documents respondents intended to use at the trial.

In fact, the House Judiciary Committee cautioned that the only time motions are properly not ruled upon are "for reasons unrelated to judicial discretion." (App. C at 3a) The Committee further stated that. "This result might occur, for example, when a case is dismissed or the parties settle, thereby rendering moot a decision on any pending motions." Id. Such is not the case in the present case, and it was error for

the district court to refuse to rule on petitioner's pretrial motions.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation marks omitted). Because fundamental fairness requires that a party have the opportunity to present evidence on the allegations of the complaint and the contested factual issues, the denial of this opportunity renders a court's ensuing judgment void. See *Klapprott v. United States*, 335 U.S. 601, 609 (1949) (stating that "if the hearing of evidence is a legal prerequisite to rendition of a valid . . . judgment," the denial of the opportunity to be heard renders the judgment void); *In re Complaint of Bankers Trust Co.*, 752 F.2d 874, 890 (3d Cir. 1985) ("Due Process mandates that a judicial proceeding give all parties an opportunity to be heard on the critical and decisive allegations which go to the core of the parties' claim or defense and to present evidence on the contested facts."); *Thompson v. Madison County Bd. of Educ.*, 476 F.2d 676, 678 (5th Cir. 1973) (noting the importance of an opportunity to present evidence and concluding that "a court can only render a judgment after the parties have been afforded a full and fair trial on the claims properly before the court").

The District Court's refusal to rule on petitioner's pretrial motions prevent petitioner from having his motions heard, having his evidence and objections

raised in the motions heard, and petitioner a fair trial.

B. Rule 60(b)(6)

Petitioner was equally warranted relief under Rule 60(b)(6). Rule 60(b)(6) provides that a court may "relieve a party . . . from a final judgment . . . for . . . any other reason justifying relief from the operation of the judgment." Rule 60(b) sets out five specific bases for granting relief from a final judgment, followed by clause (b)(6). The courts have held that this clause's "'any other reason' language refers to any other reason than those contained in the five enumerated grounds on which a court may grant a Rule 60(b) motion." *Government Fin. Servs. One Ltd. Partnership v. Peyton Place, Inc.*, 62 F.3d 767, 773 (5th Cir. 1995) (citing cases).

Courts have frequently have recognized that "'Rule 60(b)(6) is a grand reservoir of equitable power to do Justice in a particular case when relief is not warranted by the preceding clauses,'" e.g., *id.* (quoting *Harrell v. DCS Equip. Leasing Corp.*, 951 F.2d 1453 (5th Cir. 1992)).

When a motion is not even considered or ruled upon a clear abuse of discretion has occurred. *Ellison v. Ford Motor Co.*, 847 F.2d 297, 300-01 (6th Cir.1988); *In re School Asbestos Litig.*, 977 F.2d 764 (3d Cir.1992); *McDonnell Douglas Corp. v. Polin*, 429 F.2d 30, (3d Cir.1970). This is especially true with discovery motions because, as this Court has consistently held

"mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S. Ct. 385, 392, 91 L. Ed. 451 (1947).

Furthermore, "a district court's failure to exercise discretion constitutes an abuse of discretion." *Miller v. Hambrick* , 905 F.2d 259, 262 (9th Cir. 1990).

The Court of Appeals inappropriately declined to make a finding as to whether or not the district court's refusal to rule on petitioner's motion to compel production of documents, motion to exclude, and motion to strike relitigation of a dismissed count was reversible error.

This Court should summarily reverse the Court of Appeal's disposition of the Rule 60(b) motion.

Argument IV.

Federal Courts Generally Accord Wide Deference to the Expressed Intent of Congress and the Lower Courts Erred by Not Doing So in this Case

The Committee on the Judiciary made it clear that a district judge does not "[have] the option of ruling on a valid motion that is offered in accordance with the relevant rules of procedure." (App.C). The Judiciary Committee recognized and stated: "That is, after all, part of what judges do." Id.

The lack of deference to this decree by the Court of Appeals ignores the well-settled principle that Courts must accord substantial deference to the predictive judgments of Congress. *Turner Broad Sys. Inc. v. FCC*, 512 U.S. 622, 665 (1994) (Kennedy, J. Op.)).

Because the lower courts are created by Congress, a lower court's powers are "conditioned by the necessities of public interest which Congress has sought to protect." 321 U.S. at 330. The clear interest here that Congress directly sought to protect is the right of litigants to rulings on their pretrial motions in accord with the Fifth Amendment due process rights to fair proceedings.

Federal courts, do not, and should not " `sit as a superlegislature to judge the wisdom" of Congress's decisionmaking. *New Orleans v. Dukes*, 427 U. S. 297, 303 (1976) (per curiam), especially where congress makes its intent clear, as in this case.

CONCLUSION

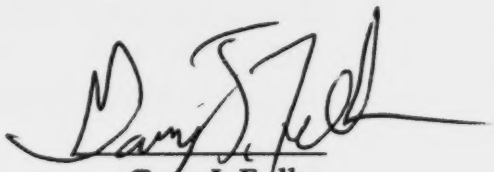
The House Judiciary Committee has personally expressed its intent in this case. It has addressed the very issue on disposition and has opined contrary to the lower court's affirmance of the district court's refusal to rule on pretrial motions.

To deny certiorari and leave the Court of Appeals Opinion undisturbed would unnecessarily slight the

Judiciary Committee who invested time and resources in addressing the issue, and thwart the clear objectives of Congress regarding sound public policy in entitling litigants in court proceedings to rulings on their motions. The law favors this policy. Furthermore the district court clearly and grossly erred in refusing to rule on petitioner's pretrial motions.

THEREFORE, based upon the Opinion delivered by the U.S. House of Representatives, Committee on the Judiciary, and for the supporting legal reasons and stated herein, Petitioner respectfully requests that this Court:

GRANT Certiorari, and summarily REVERSE the judgment of the Court of Appeals with instructions on remand that Petitioner's Rule 60(b) motion be GRANTED.



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APPENDIX A

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Congress of the United States
House of Representatives

WASHINGTON, DC 20515–2504

September 14, 2000

Mr. Gary J. Fuller
728 Glendale Drive
Jefferson City, MO 65102

Dear Mr. Fuller:

Thank you for writing to me. Per your request, I have forwarded your correspondence to the House Committee on the Judiciary for their comment. As soon as I hear back from the Committee, I will forward you a response.

kindest and best regards.

Very truly yours,

S/IKE SKELTON
Member of Congress

APPENDIX B

IKE SKELTON
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Congress of the United States
House of Representatives

WASHINGTON, DC 20515–2504

September 14, 2000

THE HONORABLE HENRY J. HYDE, Chairman
House Committee on the Judiciary
2110 Rayburn House Office Building
Washington, D.C. 20515

Dear Henry:

Enclosed please find corresponence from a resident of Missouri's Fourth Congressional District, Mr. Gary J. Fuller. He is requesting the opinion of the House Committee on the Judiciary regarding a legal question.

I look forward to hearing back from you regarding this matter in the not too distant future. kindest and best regards.

S/IKE SKELTON
Member of Congress

APPENDIX C

ONE HUNDRED SIXTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6216
(202) 225–3951
September 26, 2000

Mr. Gary J. Fuller
728 Glendale Drive
Jefferson City, MO 65102

Dear Mr. Fuller:

Thank you for your inquiry regarding the obligation of a judge to rule on a pretrial motion.

I do not believe that a judge has the *option* of ruling on a valid motion that is offered in accordance with the relevant rules of procedure. This is, after all, part of what judges do. That said, there are probably certain scenarios in which rulings are not made for reasons unrelated to judicial discretion. This result might occur, for example, when a case is dismissed or the parties settle, thereby rendering moot a decision on any pending motions.

I hope this information has been helpful. Good luck in your endeavors.

Sincerely,
S/HENRY HYDE
Chairman

APPENDIX D

IKE SKELTON
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Congress of the United States
House of Representatives

WASHINGTON, DC 20515–2504

February 15, 2001

Mr. Gary J. Fuller
728 Glendale Drive
Jefferson City, MO 65102

Dear Mr. Fuller:

Thank you for your letter dated February 6, 2001. I appreciate your kind words and I am glad that the House Judiciary Committee responded directly to your concerns.

kindest and best regards.

Very truly yours,

S/IKE SKELTON
Member of Congress

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

GARY FULLER, Plaintiff

v.

WENDELL RAYBURN, et. al., Defendants
Case No. 95-4375-CV-C-SOW

ORDER

Before the Court is the Motion of the National Chapter of the Coalition For Justice For All ("CFJFA") for Leave to File a Brief as Amicus Curiae (Doc. #234). For good cause shown, and with no objection by either party, it is hereby

ORDERED that the Motion is granted and CFJFA's Amicus brief, attached to its Motion for Leave, shall be filed and docketed by the Clerk of Court.

S\ SCOTT O. WRIGHT
Senior U.S. District Judge

Dated: March 29, 2001

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

GARY FULLER, Plaintiff

v.

WENDELL RAYBURN, et. al., Defendants

Case No. 01-1328

March 12, 2001

BEFORE MCMILLIAN, MORRIS SHEPPARD ARNOLD, and RICHARD S. ARNOLD

JUDGMENT

This court has reviewed the original file of the United States District Court. It is ordered by the court that the district court's denial of the appellant's Rule 60(b) motion is summarily affirmed. See Eighth Circuit Rule 47A(a).

Entered at the Direction of the Court
S\Michael E. Gans
Clerk of Court

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

GARY FULLER, Plaintiff

v.

WENDELL RAYBURN, et. al., Defendants
Case No. 95-4375-CV-C-SOW

ORDER

Before the Court are plaintiff's Motion for Relief from Judgment and to Amend Count II of the Complaint (Doc. #228), plaintiff's Motion for Judicial Notice (Doc. #230), and plaintiff's Supplemebtal Motion for Relief from Judgment (Doc. #232). Plaintiff's case was tried before this Court in May of 1999. After a three-day trial, the jury returned a verdict in favor of defendants. Subsequent to entry of the judgment, plaintiff moved for judgment as a matter of law, a new trial, leavbe to amend his Complaint, and recusal of the undersigned judge. All of these motions were denied. On July 28, 1999, plaintiff filed his notice of appeal, challenging the

denial of plaintiff's motion for default judgment, new trial, and recusal. On September 11, 2000, the Eighth Circuit affirmed this Court's rulings. Now plaintiff again appears before the Court asking that the outcome of this litigation be overturned. However, plaintiff simply revives arguments and issues that have already been ruled by this Court and affirmed on appeal. For this reason, it is hereby ordered that plaintiff's Motion for Relief from Judgment and to Amend Count II of the Complaint (Doc. #228) is denied. It is further ordered that plaintiff's Motion for Judicial Notice (Doc. #230) isdenied. It is further ordered that plaintiff's Supplemental Motion for Relief from Judgment (Doc. #232) is denied.

S\ SCOTT O. WRIGHT
Senior U.S. District Judge

Dated: January 23, 2001

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

GARY J. FULLER,
Plaintiff

v.

WENDELL RAYBURN et. al.,
Defendants

Case No: 95-4375-CV-C-SOW

MOTION BY PLAINTIFF AND SUGGESTIONS IN SUPPORT FOR RELIEF FROM JUDGMENT AND FOR LEAVE TO AMEND COUNT II OF THE COMPLAINT

BACKGROUND

This case is before the Court pursuant to Rules 60(b)(4) and 60(b)(6) of the Federal Rules of Civil Procedure on plaintiff's Motion for Relief from Judgment, and Rule 15 for leave to amend Count II.

On September 23, 1995 plaintiff filed a Title VI action against defendants alleging race discrimination.

On April 26, 1996, the complaint was amended to state a Title VI discrimination action under count I and a personal-capacity section 1983 Fourteenth Amendment due process claim under Count II. (Doc. #58).

On November 7, 1998 this Court granted summary judgment to the defendants on all counts. (Doc. #115). On November 17, 1998 the court of appeals reversed and remanded the case for trial and proceedings consistent with its mandate. See, Fuller v. Rayburn I, 161 F.3d 516 (8th Cir. 1998).

Prior to trial, the Court issued a March 2nd 1999 order permitting discovery. (Doc. #131) Determining that defendants had not complied with any of plaintiff's discovery requests, the Court ordered the defendants to do so within ten days of its order. (Doc. #140). Despite the order, defendants failed to produce documents (Ex.A,B: Declaration of Gary Fuller; amended affidavit of Miriam Fuller). Plaintiff thereafter promptly filed a motion to compel defendants to produce documents, and listed every document he was denied therein. (Doc. #162). The court refused to rule on the motion. Apart from the Court's finding that defendants failed to comply with plaintiff's discovery requests, (Doc. #140), the court made no findings of fact and held no hearings pursuant to the motion or as to the issue of production of documents.

Simultaneously, on April 30, 1999, plaintiff filed a motion to exclude privileged, confidential, and protected documents. The motion also raised legal issues. (Doc. #161). The Court refused to rule on the motion at any time in the case.

The court did not enter a pretrial order designating the issues for trial. Plaintiff was unaware of whether or not count II would be reinstated for trial. Against that backdrop, plaintiff, on May 3, 1999 filed a motion to strike certain material of defendants proposed readings and voir dire that relitigated Count II of the complaint. (Doc. #165). The Court refused to rule on the motion also.

Trial was held on Counts I and II. Pursuant to count II, defendants counsel recited the incident with Dr. Beza, and argued that the plaintiff's due process rights had not been violated because he allegedly did not attend a hearing on the disciplinary matter (Partial Trial Transcript pp. 19 to 21). The jury found in favor of defendants on the defendants on the Title VI discrimination claim. No verdict was rendered on count II.

The district court entered what it "deemed" as a final judgment, although it only referred to the Count I discrimination claim. (Do. #194). The order was neither certified, nor signed by the judge. Plaintiff informed the Court that no decision was rendered on Count II by motion for a new trial and to amend count II. The court denied the motion (Do. #224). The Court of Appeals affirmed although never reaching the issues stated herein.

STANDARD OF REVIEW

Rule 60(b)

Rule 60(b) motions are to be given a liberal construction so as to do substantial justice and "' to prevent the judgment from becoming a vehicle of injustice'" Rosebud Sioux Tribe v. A & P Steel, Inc., 733 F.2d 509, 515 (8th Cir.), cert. denied, 469 US 1073 (1984). "This motion is grounded in equity and exists to "to preserve the delicate balance between the sanctity of final judgments . . . and the incessant command of a court's conscience that justice be done in light of all the facts." Id.

"Federal Rule of Civil Procedure 60(b) provides a procedure whereby, in appropriate cases, a party may be relieved of a final judgment." Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 863 (1988).

Rule 60(b) "gives the court a 'grand reservoir of equitable

power to do justice in a particular case.'" Pierce v. Cook & Co., 518 F.2d 720, 722 (10th Cir. 1975) (en banc) (quoting Radack v. Norwegian America Line Agency, Inc., 318 F.2d 538, 542 (2d Cir. 1963)), cert. denied, 423 U.S. 1079 (1976).

Argument

I. This Court's Judgment is void pursuant to Rule 60(b)(4) because plaintiff was denied due process by the Court's refusal to rule on his motions.

A. *Rule 60(b)(4) Is Not Discretionary*

Primarily, unlike the other subsections of Rule 60(b), when Rule 60(b)(4) is applicable, "relief is not a discretionary matter; it is mandatory." T.A., Inc. v. Airco, Inc., 597 F.2d 220, 224 n.8 (10th Cir. 1979). Furthermore, if a judgment is void, a Rule 60(b)(4) motion to set it aside may be brought at any time. See 11 C. Wright & A. Miller, Federal Practice and Procedure § 2862 at 197 (1973).

B. *The May 21, 1999 Judgment is Void*

A judgment is void if the court that rendered the judgment acted in a manner inconsistent with due process of law. United States v. Indoor Cultivation Equip. from High Tech Indoor Garden Supply, 55 F.3d 1311, 1316 (7th Cir. 1995). "The Fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Matthews v. Eldridge, 424 U.S. 319, 333 (1976).

In this case the Court refused to rule on the following crucial pretrial motions properly submitted by plaintiff:

- Plaintiff's Motion to Compel (Doc. #162)
- Plaintiff's Motion to Exclude (Doc. #161)
- Plaintiff's Motion to Strike (Doc. #165)

It should be first noted that a refusal to rule on a motion generally constitutes abuse of discretion. Ellison v. Ford Motor Co., 847 F.2d 297, 300-01 (6th Cir. 1988) (finding abuse of discretion where district court failed to rule on a motion to amend).

Under the due process clause plaintiff was denied his opportunity to be heard on the discovery conflict when this Court refused to rule on plaintiff's motion to compel. The same is true with the other unadjudicated motions. See e.g. In re Complaint of Bankers Trust Co., 752 F.2d 874, 890 (3d Cir. 1985) ("Due process mandates that a judicial proceeding give all parties an opportunity to be heard . . .").

The plaintiff received no documents in requests for production. This Court even rejected defendants contrary explanation that plaintiff had somehow examined their documents and ordered them to properly respond to plaintiff's discovery requests. (Doc. #140). The plaintiff was prejudiced in that he was forced to go to trial without defendants' having complied with his discovery requests.[1] The Eighth Circuit has also recognized that in certain circumstances, the refusal to rule on a motion to exclude is an abuse of discretion. United States v. Burkhead, 646 F.2d 1283 (8th Cir. 1981). In this case the court issued no Rule 16 pretrial order designating the issues for trial. Furthermore, plaintiff's motion to exclude contained matters concerning privileged material and issues of law which should have been addressed prior to trial as to inform plaintiff of the issues for trial in the absence of a pretrial order doing such. Plaintiff was denied his due process right to be heard by the court's refusal to rule on the motion.

Similarly, plaintiff's Motion to Strike (Doc. #165) sought to clarify the issues for trial by eliminating references to then-dismissed count II from defendants' voir dire and designated readings.

The court's refusal to rule on or even consider that motion also violated plaintiff's due process rights to be heard on issues related therein.

Plaintiff also asserts herein that relief is proper upon the allegations in this subsection, alternatively, under Rule60(b)(6).

With that said, relief under 60(b)(4) is foremost proper because the judgment is void as plaintiff was denied due process by the refusal of the court to rule on, consider, or hear the three successive motions stated herein. Winhoven v. United States, 201 F.2d 174, 175 (9th Cir. 1952) (a judgment may be set aside on voidness grounds under Rule 60(b)(4) for a violation of the due process clause of the Fifth Amendment.).

II. The May 21,1999 order did not constitute a final judgment as Plaintiff did not receive a judgment on Count II of the complaint which was tried before the jury; thus this case must be reopened

A. Rule 60(b)(6)

Rule 60(b)(6) grants, in particular, federal courts broad authority to relieve a party from a final judgment "upon such terms as are just . . . for . . . any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). "

Under Rule 60(b)(6), the decision whether to grant or deny relief is within the sound discretion of the district judge. United States v. Golden Elevator, Inc., 27 F.3d 301, 303 (7th Cir. 1994). The motion should be granted if the substance of the motion demonstrates "a substantial danger of an unjust result." Merit Insurance Co. v. Leatherby Insurance Co., 714

F.2d 673, 682-83 (7th Cir. 1983), cert. denied, 469 U.S. 918, 105 S. Ct. 297, 83 L. Ed. 2d 232 (1984).

Furthermore there is no time limitation on a Rule 60(b)(6) motion. Sudeikis v. Chicago Transit Authority, 774 F.2d 766, 769 (7th Cir. 1985) ("There is no hard and fast rule as to how much time is reasonable for the filing of a Rule 60(b)(6) motion."). Menier v. United States, 405 F.2d 245 (5th Cir. 1968) (judgment vacated on a Rule 60(b) motion made over two years after entry).

B. *The May 21, 1999 Order Does Not Constitute a Final Judgment*

Generally, a district court decision is final when "the district court has rendered a decision that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Towers Hotel Corp. v. Rimmel, 871 F.2d 766, 769 (8th Cir. 1989), citing Catlin v. United States, 324 U.S. 229, 233, 89 L. Ed. 911, 65 S. Ct. 631 (1945).

However, if all the claims are not adjudicated, the judgment is not final. Thomas v. Basham, 931 F.2d 521 (8th Cir.1991). Rule 60(b)(6) relief is proper when substantial errors pertinent to the status of judgments prejudice a party. Buckeye Cellulose Corp., v. Briggs Elex. Const. Co., 569 F.2d 1036, 1038-39 (8th Cir. 1978) (court clerk affirmatively misled parties who diligently sought court's judgment, informing them that no judgment had been entered, when, in fact, the contrary was true, Rule 60(b)(6) relief warranted "to promote the ends of justice"). Furthermore, this is an extraordinary situation which commands Rule 60(b)(6) relief.

Count II of the complaint, which was a procedural due process claim referred to allegations that a University professor, Dr. Beza, threatened plaintiff and security personnel pursued him, and that plaintiff was summarily

discharged from the University in violation of his Fourteenth Amendment Due Process Rights. (Doc. #58 pp.7-8).

Pursuant to count II, defendants' counsel defended the university's actions by eliciting, through adverse witness testimony, 'his version' of the facts surrounding the Dr. Beza, and argued to the jury that the plaintiff's due process rights had not been violated because plaintiff allegedly did not attend a hearing on the disciplinary matter (Partial Trial Transcript pp. 19 to 22).

After litigating Count II before the jury, the jury was not instructed on count II, which constituted plain error. Furthermore there was no verdict on count II, which also constituted plain error that adversely affected plaintiff's right to a judgment on Count II. *See generally* Platis v. Stockwell, 630 F.2d 1202 (7th Cir. 1980); United States v. Atkinson, 297 U.S. 157, 160, 80 L. Ed. 555, 56 S. Ct. 391 (1936) (irregardless of whether or not a party failed to object to a jury instruction, the error is reversible error if obvious and to ignore it may result in a miscarriage of justice.). The absence of a verdict on Count II is clearly obvious and resulted in a miscarriage of justice. *accord* Platis.

The plaintiff raised this issue before the court in his Motion for new Trial and for leave to amend Count II.

Because the May 21st 1999 order did not dispose of all claims - to wit, Count II - and because there was no Rule 54(b) certification, the May 21st order is not a final judgment. See e.g. HBE Leasing Corp. v. Frank, 48 F.3d 623, 632 (2d Cir. 1995) (holding that order that did not resolve all the claims in the action was interlocutory and was not final because there was no Rule 54(b) certification); see also Martin-Trigona, 763 F.2d at 139 (judgment not final where

the litigant appealed from an order disposing of only a portion of the case and the district court had not certified the appeal pursuant to Rule 54(b)).

The absence of a judgment on Count II after it was tried before a jury further violated plaintiff's Seventh Amendment constitutional rights. The Seventh Amendment preserves the right to a jury trial "in Suits at common law." U.S. Const. amend. VII. This right encompasses all actions in which legal rights are to be determined, as opposed to those in which only equitable rights and remedies are involved. Cox v. C.H. Masland & Sons, Inc., 607 F.2d 138, 142 (5th Cir. 1979) (citing Ross v. Bernhard, 396 U.S. 531 (1970)).

Thus, Once the right to a jury trial attaches to a claim, however, it extends to all factual issues necessary to resolving that claim. See Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-11 (1959). The plaintiff was therefore entitled to a judgment on Count II as a matter of right.

The May 21st order is not a final judgment as it did not dispose of Count II which was litigated at trial, thus this case must be reopened.

MOTION TO AMEND

Initially, it is prudent to point out that this Court's March 2nd, 1999 order reopening discovery and establishing the deadline for dispositive motions did not set a deadline for filing motions to amend.

Rule 15(a) sets forth a policy in favor of granting leave to amend, stating that "leave shall be freely given when justice so requires." "[M]ere delay" is not, of itself, sufficient to justify denial of a Rule 15(a) motion, see, e.g., Richardson Greenshields Securities, Inc. v. Lau, 825 F.2d 647, 653 n.6 (2d

Cir. 1987) (citations omitted). It should be emphasized that case law manifests "liberality in allowing amendments to a complaint." Moore v. City of Paducah, 790 F.2d 557, 562 (6th Cir. 1986).

"Outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." Ondis v. Barrows, 538 F.2d 904, 909 (1st Cir. 1976). See also Evans v. Syracuse City School Dist., 704 F.2d 44, 46 (2d Cir. 1983).

There has already been a trial on Count II although no judgment was rendered, no new discovery would be required, and the facts upon which the count II are based are well known to the defendants. See Sweetheart Plastics, Inc. v. Detroit Forming, Inc., 743 F.2d 1039, 1044 (4th Cir. 1984) (motion to amend may be granted because defendant "has been aware since the filing of the [plaintiff's] complaint of the circumstances from which [count II] arose").

The proposed amendments would: (1) Clarify the cause of action as arising 42 U.S.C 1983 against the defendants in their personal capacities; (2) Would state facts already litigated at trial in this case that plaintiff was discharged after the incident in Count II without prior notice or opportunity to respond; (3) Would clarify that plaintiff had a protected liberty and property interest in his continuing education at defendants university, and such infringement without due process caused him injury as specified in the complaint

The complaint further states a proper cause of action upon those proposed amendments, as it is unquestioned that a student's interest in pursuing an education is included within the fourteenth amendment's protection of liberty and property. See Goss v. Lopez, 419 U.S. 565, 574-75, 42 L. Ed.

2d 725, 95 S. Ct. 729 (1975). Hence, a student facing expulsion or discharge from an educational institution is entitled to the protections of due process. See id. at 575-76; Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 157 (5th Cir.), cert. denied, 368 U.S. 930, 82 S. Ct. 368, 7 L. Ed. 2d 193 (1961).

CONCLUSION

WHEREFORE, PLAINTIFF, for the foregoing reasons requests the Court to grant his motion in all respects

RESPECTFULLY SUBMITTED BY:

S/Gary Fuller
Plaintiff
728 Glendale Drive
Jefferson City, MO 65102
(573) 636-7472

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

GARY FULLER, Plaintiff

v.

WENDELL RAYBURN, et. al., Defendants

Case No. 99-3059 [unpublished]

August 14, 2000

BEFORE MCMILLIAN, MORRIS SHEPPARD ARNOLD, and RICHARD S. ARNOLD

JUDGMENT

Gary Fuller appeals the district court's orders denying his motions for default judgment, and a new trial, in his action alleging Lincoln University discriminatorily canceled his enrollment. We conclude that the district court did not abuse its discretion in denying default judgment under Fed. R. Civ. P. 37. See Chrysler Corp. v. Carey, 186 F.3d 1016, 1019 (8th Cir. 1999)(standard of review; t impose Rule 37 sanctions there must be order compelling discovery, willful violation of that order, and

prejudice to other party); cf. Sylla-Sawdon v. Uniroyal Goodrich Tire Co., 47 F.3d 277, 280 (8th Cir.) (generally this court will not interfere with great latitude exercised by the district court in discovery matters), cert. denied, 516 U.S. 822 (1995).

Because Mr. Fuller failed to file a complete trial transcript, we cannot determine whether the verdict was against the weight of the evidence or whether the challenged evidence was "so prejudicial that a new trial would likely produce a different result." See Ogden v. Wax Works, Inc., 214 F.3d 999, 1010-11 (8th Cir. 2000) (standard of review; grounds for granting new trial); Schmid v. Unied Bd. of Carpenters and Joiners of Am., 827 F.2d 384, 385-86 (8th Cir. 1987) (where appellant challenged final judgment on jury verdict failed to file trial transcript, it was impossible to determine accuracy and context of judge's comments allegedly indicating bias, to evaluate challenged evidentiary rulings, or to rule on weight of evidence). cert. denied, 484 U.S. 1071 (1988).

We deny Mr. Fuller's motion to strike appellees brief and addendum.

Accordingly, we affirm. See 8th Cir. R. 47B.

ATTEST:

CLERK OF COURT

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

GARY FULLER, PLAINTIFF

v.

WENDELL RAYBURN ET AL.,

DEFENDANTS

No. 95-4375-CV-C-SOW

MOTION BY PLAINTIFF TO COMPEL AND OBJECTIONS TO DEFENDANTS' EXHIBITS

COMES NOW, plaintiff, and hereby requests the Order of the Court requiring defendants to comply with plaintiff's requests for production by sending plaintiff copies of documents they intend to use at trial, and propounds his supporting objections to defendants' exhibits.

I. PLAINTIFF'S OBJECTIONS, AND REASONS FOR EXCLUSION

1. Fully approved request for Permission to Enroll in Academic Courses.

Objection: This document was tendered before plaintiff's discharge and is irrelevant to the lawsuit. This document has no probative value, and can only serve to prejudice plaintiff. Defendants refused to answer plaintiff's First and Second Requests For Production and have failed to produce this document for plaintiff's inspection. Therefore it would be prejudicial to plaintiff to allow defendants to use this document at trial.

2. Policy of Board of Curators adopted June 25, 1986.

Objection: Defendants refused to answer plaintiff's First and Second Requests For Production and have failed to produce this document for plaintiff's inspection. Therefore it would be prejudicial to plaintiff to allow defendants to use this document at trial.

3. 1993-95 *Undergraduate Bulletin*

Objection: Defendants refused to answer plaintiff's First and Second Requests For Production and have refused to produce this document for plaintiff's inspection in accordance with this Court's prior orders. Therefore it would be prejudicial to allow defendants to use this document at trial.

4. Records relating to Heather L. Gaston:
Objection: Defendants refused to answer plaintiff's First and Second Requests For Production and have refused to produce this document for plaintiff to inspect in accordance with this Court's prior orders. Therefore it would be prejudicial to allow defendants to use this document at trial.

5. Records relating to Bryan K. Wolf:
Objection: Defendants refused to answer plaintiff's First and Second Requests For Production and have refused to produce this document for plaintiff to inspect in accordance with this Court's prior orders. Therefore it would be prejudicial to allow defendants to use this document at trial.

6. Records relating to Stephanie L. Patrick:
Objection: Defendants have refused to answer plaintiff's First and Second Requests for Production and have refused to produce this document for plaintiff to inspect in accordance with this Court's prior orders. Therefore it would be prejudicial to allow defendants to use this document at trial.

7. Printout of classes, fees, and deadlines received by plaintiff at enrollment:
Objection: Defendants refused to

answer plaintiff's First and Second Requests for Production and have refused to produce this document for plaintiff to inspect in accordance with this Court's prior orders (*see exhibits attached hereto*). Therefore it would be prejudicial to allow defendants to use this document at trial.

8.Letter from President Rayburn to Dr. Foster Fuller dated April 13, 1994:
Objection: Defendants refused to answer plaintiff's First and Second Request for Production and have refused to produce this document for plaintiff to inspect in accordance with this Court's prior orders (*see exhibits attached hereto*). Therefore it would be prejudicial to allow defendants to use this document at trial.

9. Letter from Dr. Taylor to Dr. Foster Fuller:
Objection: Defendants have refused to answer plaintiff's First and Second Requests for Production and have refused to produce this document for plaintiff to inspect in accordance with this Court's prior orders. Therefore it would be prejudicial to allow defendants to use this document at trial.

10. Job Training Individual Referral Agreement:
Objection: Defendants have failed to answer

plaintiff's First and Second Requests for Production and have refused to produce this document for plaintiff to inspect in accordance with this Court's prior orders. Therefore it would be prejudicial to allow defendants to use this document at trial.

11.Posting of deadline to pay fees:
Objection: Defendants have failed to answer plaintiff's First and Second Requests for Production and have refused to produce this document for plaintiff to inspect in accordance with this Court's prior orders. Therefore it would be prejudicial to allow defendants to use this document at trial.

12. Copy of portions of plaintiff's deposition:
Objection: Defendants have refused to answer plaintiff's First and Second Request for Production and have refused to produce this document for plaintiff to inspect in accordance with this Court's prior orders. Therefore it would be prejudicial to allow defendants to use this document at trial.

13. Plaintiff's original Complaint filed in this action:
Objection:Plaintiff amended his complaint and this case was tried by the Eighth Circuit Court of Appeals on the merits of plaintiff's amended complaint. Use of this document

would be irrelevant. Furthermore defendants refused to produce this document when they refused to answer plaintiff's First and Second Requests for Production. Therefore, it would be inappropriate and prejudicial to allow them to introduce this document at trial.

14. Plaintiff's schedule for Fall 1993:
Objection: Defendants have refused to produce this document when they refused to answer plaintiff's First and Second Requests For Production. Therefore it would be inappropriate and prejudicial to allow them to use this document at trial.

15. Plaintiff's father's teaching schedule:
Objection: Defendants have refused to produce this document when they refused to answer plaintiff's First and Second Requests For Production. Therefore it would be inappropriate and prejudicial to allow defendants to use this document at trial.

16. Documents regarding Dr. Beza's complaint regarding plaintiff (Sept. 22, 1993):
Objection: Dr. Beza is no longer a party to this lawsuit. The claims against him were dismissed. Any information regarding Dr. Beza would be impermissible, highly prejudicial and improper. Furthermore, defendants failed to produce such documents when they refused to answer plaintiff's First and Second Requests For Production.

Therefore defendants are barred from submitting any evidence concerning Dr. Beza.

17. Cashier's hours on September 23, 1993:
Objection: The work hours of the cashier are not an issue in this case, and are irrelevant. Furthermore, defendants have refused to produce these documents when they failed to answer plaintiff's First and Second Request For Production. Therefore, to allow the defendants to use those documents at trial would be prejudicial.

18. Plaintiff's college records:
Objection:Any documents concerning plaintiff's educational history prior to Sept. 23,1993 are confidential, irrelevant and protected by the Federal Educational Rights and Privacy Act of 1974 (FERPA). Furthermore, defendants have not stated or produced these specific documents regarding plaintiff's requests for production.

19. Statutes creating Lincoln University:
Objection:Defendants refused to answer plaintiff's First and Second Requests For Production and have refused to produce this document for plaintiff's inspection in accordance with this Court's prior orders.

Therefore it would be prejudicial to allow defendants to use this document at trial.

20. Plaintiff's father's grievance and related documents:
Objection:Defendants refused to answer plaintiff's First and Second Requests For Production and have refused to produce this document for plaintiff's inspection in accordance with this Court's prior orders. Therefore it would be prejudicial to allow defendants to use this document at trial.

21. Notes of meeting with Plaintiff:
Objection: There exists no meeting between the defendants and plaintiff. Also, defendants refused to answer plaintiff's First and Second Requests For Production and have refused to produce this document for plaintiff's inspection in accordance with this Court's prior orders. Therefore it would be prejudicial to allow defendants to use this document at trial.

22. Various demand letters from Plaintiff and his attorneys:
Objection:Demand letters and settlement discussions are inadmissible at trial. Any information they contain are purely prejudicial and totally irrelevant to the claims set forth in the lawsuit. Defendants refused to answer plaintiff's First and Second

Requests For Production and have refused to produce this document for plaintiff's inspection in accordance with this Court's prior orders. Therefore it would be prejudicial to allow defendants to use this document at trial.

23. Computer-generat4ed list and various notes:
Objection: Defendants refused to answer plaintiff's First and Second Requests For Production and have refused to produce this document for plaintiff's inspection in accordance with this Court's prior orders. Therefore it would be prejudicial to allow defendants to use this document at trial.

24. Memo from Ronald Nelson, Registrar, to Mona Ransom with 1994 cancellation list:
Objection: Defendants refused to answer plaintiff's First and Second Requests For Production and have refused to produce this document for plaintiff's inspection in accordance with this Court's prior orders. Therefore it would be prejudicial to allow defendants to use this document at trial.

25. Insurance waive: filed by Gary Fuller on 11/21/91:
Objection: The insurance fee is no longer an issue in this case. This court rejected it as "moot" in its summary judgment order and

plaintiff did not seek reversal of that finding. Furthermore, defendants refused to answer plaintiff's First and Second Requests For Production and have refused to produce this document for plaintiff's inspection in accordance with this Court's prior orders. Therefore it would be prejudicial to allow defendants to use this document at trial.

26. Reinstatement form filed by Gary Fuller in January 1989:
Objection:Defendants refused to answer plaintiff's First and Second Requests For Production and have refused to produce this document for plaintiff's inspection in accordance with this Court's prior orders. Therefore it would be prejudicial to allow defendants to use this document at trial.

27. Documents showing payment of fees for Stephanie Patrick:
Objection:Defendants refused to answer plaintiff's First and Second Requests For Production and have refused to produce this document for plaintiff's inspection in accordance with this Court's prior orders. Therefore it would be prejudicial to allow defendants to use this document at trial.

28. Documents showing payments of fees for Brian Wolfe:
Objection: Defendants refused to answer

plaintiff's First and Second Requests For Production and have refused to produce this document for plaintiff's inspection in accordance with this Court's prior orders. Therefore it would be prejudicial to allow defendants to use this document at trial.

29. Documents showing payments of fees for Heather Gaston:
Objection:Defendants refused to answer plaintiff's First and Second Requests For Production and have refused to produce this document for plaintiff's inspection in accordance with this Court's prior orders. Therefore it would be prejudicial to allow defendants to use this document at trial.

30. Insurance fee waivers:
Objection: The issue of an insurance waiver was rendered moot by the Court's prior summary judgment order and was not contested on appeal by plaintiff. Furthermore, defendants refused to answer plaintiff's First and Second Requests For Production and have refused to produce this document for plaintiff's inspection in accordance with this Court's prior orders. Therefore it would be prejudicial to allow defendants to use this document at trial.

WHEREFORE PLAINTIFF, requests the order of the court requiring defendants to send copies of their documents to plaintiff, and ruling on plaintiff's objections and striking any of defendants exhibits that it deem inadmissible for the stated reasons.

RESPECTFULLY SUBMITTED,
S/Gary Fuller
Plaintiff
728 Glendale Dr.
Jefferson City, MO 65109
(573) 636-7472

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

GARY FULLER, PLAINTIFF

v.

WENDELLRAYBURN ET AL.,
DEFENDANTS
No. 95-4375-CV-C-SOW

MOTION BY PLAINTIFF TO STRIKE PORTIONS OF DEFENDANTS' PROPOSED VOIR DIRE AND DESIGNATED READINGS THAT REFER TO COUNT II OF THE COMPLAINT, WHICH WAS DISMISSED BY THIS COURT

COMES NOW, PLAINTIFF, and moves for the order of the court striking portions of defendants proposed voir dire and designated readings referring to count II of the complaint, and objections in support thereof, and states:

1. Defendants voir dire (no. 10, 18,) and portions of their readings concern Count II of the complaint, which alleges acts by Dr. Beza and others pursuant to plaintiff's Fourteenth

Amendment Claims. Count II was **dismissed** by this court on the 7th of January, 1998, therefore any questions referring to allegations concerning Dr. Beza and Lincoln University's security personnel are irrelevant, immaterial, prejudicial, and inadmissible because those allegations were **dismissed** in this Court's Jan. 7, 1998 order granting defendants summary judgment.

2. Since Count II of the complaint was **dismissed**, and not reinstated by appeal, then Dr. Beza is no longer a defendant in this action, and any references to him should be stricken in this action.

3. The Eighth Circuit Court of Appeals ruling supports this motion by stating the following: "Mr. Fuller had alleged a second count that a University Official threatened him and security personnel pursued him, in violation of the Fourteenth Amendment. He does not refer to these facts in his brief on appeal, and we therefore do not consider this claim. ***Fuller v. Rayburn***, 161 F.3d at 517 fn. 2 (8th Cir. 1998)."

WHEREFORE, PLAINTIFF, consistent with the opinion of the Eighth Circuit Court of Appeals, requests the order of this court granting his motion to strike any reference to Count II of the complaint, which was dismissed by this

Court in its Jan. 7, 1998 summary judgment order, and not reinstated by plaintiff. And further that defendants be ordered to refile and amend their proposed voir dire and disignated readings and exhibit and witness lists consistent with this motion.

RESPECTFULLY SUBMITTED,

S/Gary Fuller
Plaintiff,
728 Glendale Dr.
Jefferson City, MO 65109
(573) 636-7472

APPENDIX L

IN THE UNITED STATES DISTRICT COURT WSTERN DISTRICT OF MISSOURI CENTRAL DIVISION

GARY FULLER, Plaintiff

v.

RAYBURN et al., Defendants

No. 95-4375-CV-C-SOW

MOTION BY PLAINTIFF TO EXCLUDE

COMES NOW, plaintiff, consistent with the judgment of the Eighth Circuit Court of Appeals, and for his motion to exclude the following from trial:

This case is to proceed consistent with the opinion of the Eighth Circuit Court of Appeals, and following their mandate the following must be excluded from trial:

I. Issues

1. The issue of whether or not plaintiff paid an activity fee should be excluded by this Court because the Eighth Circuit Court of Appeals has already rejected and overruled any probative value that this issue would have at trial. The defendants are attempting to re-try an issue which was overruled by the Eighth Circuit Court of Appeals. In reversing this Court's summary judgment in defendants' favor, the Eighth Circuit ruled that even if plaintiff had failed to timely pay his fee, if white students had also failed to timely pay the fee were not also discharged, it would be sufficient evidence for trial: *See:* ***Fuller v. Rayburn,*** 161 F.3d at 517 (8th Cir. 1993) (citing ***McDonnell Douglas Corp. v. Green,*** 411 U.S. at 794) ([it's not relevant whether plaintiff engaged in conduct warranting a discharge,

rather it is] "[e]specially relevant . . . whether white employees who engaged in same conduct were also terminated). This case is to proceed consistent with that opinion. ***Fuller v. Rayburn,*** 161 F.3d at 519 (8th Cir. 1998).

2. The issue of whether or not plaintiff filled out an insurance waiver should be excluded because this Court rejected it as "moot" when it granted defendants' summary judgment, and the Eighth Circuit also rejected this issue. *See:* ***Fuller v. Lincoln University Board of Curators, et al.,*** Case No. 95-4375, (W.D. Mo. Jan. 7, 1998) (The Honorable Scott O. Wright, District Judge) ("The insurance waiver has become a moot point since Lincoln University only requires insurance for full-time students and the plaintiff dropped enough of his classes to become a part-time student"). The Eighth Circuit Court of Appeals further rejected this

as an issue. *See:* ***Fuller v. Rayburn,*** 161 F.3d 516 (8th Cir. 1998). This case is to follow those guidelines.

3. The issue of Count II of the complaint alleging violations plaintiff's Fourteenth Amendment Claims and any reference to the incident with Dr. Beza should be excluded because this Court granted summary judgment barring that issue and since plaintiff did not contest that issue in the Eighth Circuit, the issue remains dismissed. ***Fuller v. Board of Curators of Lincoln University et al.,*** Case No. 95-4375, (W.D. Mo. Jan. 7, 1998).

4. The issue of whether the Caucasian students were similarly-situated with plaintiff should be excluded because:

(a). The defendants previously brought

the issue before the Eighth Circuit Court of Appeals who ruled that by virtue of being students at Lincoln University, plaintiff and the Caucasian students were similarly situated. *Cf* ***Fuller v. Rayburn,*** 161 F.3d at 518 (8th Cir. 1998) ("We conclude that Mr. Fuller created a material question of fact as to pretext by identifying white students who he testified were permitted to continue to attend classes after failing to pay their fees").

5. Use of any of plaintiff's confidential educational records dated before August 25, 1993, the semester the alleged discrimination took place, should be excluded because:

(a). Any of plaintiff's educational records prior to the semester of the alleged misconduct are irrelevant and are confidential and protected by the Federal Educational Rights

and Privacy Act of 1974 (FERPA).

(b). Any of plaintiff's educational records prior to the date of alleged discrimination are irrelevant and would only have prejudicial, if any, value.

6. The legal documents such as demand letters should be excluded because:

(a). They provide no basis for fact concerning the Title VI discrimination claims.

(b). They are not admissible under Federal Rules of Evidence.

(c). Their prejudicial nature towards plaintiff outweighs any probative value.

(d). They are protected under the

attorney-client confidentiality doctrine and use of them would constitute a violation of plaintiff's confidentiality rights.

WHEREFORE, PLAINTIFF requests the order of this court, as is consistent with the opinion of the Eighth Circuit Court of Appeals, granting his motion to exclude.

RESPECTFULLY SUBMITTED,

S/Gary Fuller
Plaintiff,
728 Glendale Dr.
Jefferson City, MO 65109
(573) 636-7472

APPENDIX M

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

GARY FULLER, Plaintiff

v.

WENDELL RAYBURN, et. al., Defendants
Case No. 95-4375-CV-C-SOW

Docket of all proceedings from April 30 1999 to April 9, 2001

4/30/99 #161 Motion by plaintiff to exclude

4/30/99#162 Motion by plaintiff to Compel defendants to comply with plaintiff's requests for prod. of documents

4/30/99 #163 Certificate of Service by defendant

5/03/99 #164 Objections by plaintiff to voir dire

5/03/99 #165 Motion by plaintiff to strike

5/03/99 #166 Objections by plaintiff to defendants proposed jury instructions

5/03/99 #167 Witness list submitted by plaintiff

5/03/99 #168 Exhibit list submitted by plaintiff

5/03/99 #169 Defendants objections to pla's proposed designated readings for trial

5/04/99 #170 Jury instructions by defendants

5/04/99 #171 Plaintiff's cert. of dervice of 2nd requestsfo admissions

5/04/99 #172 Plaintiff's designated readings for trial

5/05/99 #173 Def 's response to pla's objections to def's cert. of compliance re request for prod. of documents.

5/04/99 #174 Def. cert. of service of amended respones to pla's 2nd and 3rd interrs

5/05/99 #175 Return of Service by def. of subpoena on Susan Turner

5/07/99 #176 Def. Sugg. in Opp. to Plaintiff's Motion to Compel Production of Documentd

5/07/99 #177 Def. Sugg. in Opp. to Plaintiff's Motion to Strike

5/07/99 #178 Def. response to pla's objections to def. proposed voir dire

5/07/99 #179 Def. Objections to pla's amended desig. readings

5/07/99 #180 Def. response to pla's 2nd req. for admissions

5/10/99 #181 Return of service of subpoena for Mitchel Pouncil

5/10/99 #182 Minute entry of trial; Judge Scott O. Wright presiding over 1st day of jury trial; jury of 8 sworn; P/T conf. held

5/10/99 #184 Jury List

5/12/99 #183 Return of Service of subpoena for Lori Lemaster

5/18/99 #185 Minute Entry: 2nd day of jury trial

5/18/99 #186 Cert. of tras. of depo. of plaintiff taken by def.

5/18/99 #192 Minute Entry: 3rd day of jury trial; verdict returned in favor of def.

5/19/99 #187 Motion by Def. for directed verdict at the close of pla's evidence - Overruled by SOW.

5/19/99 #188 Court's exhibit index from trial

5/19/99 #189 Def. Exhibit list

5/19/99 #190 Pla. Exhibit list

5/19/99 #191 Motion by Def. for directed verdict at the close of pla's evidence - Overruled by SOW.

5/19/99 #193 Jury instructions-Given by Court

5/19/99 #194 Verdict in favor of defendants

5/20/99#195 Motion by pla. for new trial and to amend ct. II of complaint & recusal

5/21/99 #196 CLERK'S JUDGMENT

5/24/99 #197 Pla.'s motion for Jugment as matter of law

5/24/99 #198 Pla.'s sugg. in support of motion for new trial, leave to amend, & recusal

5/25/99 #199 Pla.' prop. amend. to ct. II of cmp.

5/26/99 #200 Pla.'s sugg. in support of motion for new trial re: ct I of comp.

5/26/99 #201 Pla.'s sugg. in support of motion for new trial re: ct II of comp.

5/26/99 - - PROPOSED BILL OF COSTS

5/27/99 #202 Def. Sugg. in opp. to pla.'s motion for JAML

5/27/99 #203 Pla. sugg. in supp. of mt to amend ct. II of cmp.

5/28/99 #204 Transcript of P/T conf. held on 5/18/99

5/28/99 #205 Part. transcript of jury trial

6/01/99 #206 Mot. by Pla. to modify record

6/01/99 #207 Def mot. for ext. of time to resp. tp pla.'s mot. for new trial

6/02/99 #208 mot. by pla. to strike def. mot. for ext. of time to respond to pla.'s mt. for new trial

6/09/99 #209 Pla.'s Objections to bill of costs

6/10/99 #210 Def. sugg. in opp. to pla.'s mot. to strike def.'s mt. for ext. of time

6/10/99 #211 Def. Sugg. in opp. to pla.'s mot. to modify record

6/10/99 #212 Def. Sugg. in opp. to pla.'s mot. for new trial, to amend, and for recusal

6/14/99 #213 Pla.'s reply in supp. of his mot. for new trial, to amend, & mod. the rec.

6/17/99 #214 Def Reply to pla's obj. to bill of costs

6/18/99 #215 Order by judge denying pla's mot. for JAML, granting def.'s mot. to ext. time and Denying pla.'s mot. to strike def.'s mot. for ext. of time.

6/22/99 #216 Pla. Sugg. in Supp. of mot. for new trial & to amend and notice of def's non-compliance.

6/22/99 #217 AFFIDAVIT of Miriam Fuller

6/23/99 #218 Amended Affidavit of Mitiam Fuller

6/25/99 #220 Def Not. re: response to pla.'s mot. for new trial.

6/28/99 #219 Def. resp. to pla.'s sugg.

7/16/99 #221 Def. resp to amen. aff. of Miriam Fuller

7/16/99 #222 Def. Mot. to strike post-trial pleadings

7/19/99 #223 Pla.'s resp. in opp. to def.'s mt. to strike

7/23/99 #224 Order by judge denying mt. for new trial, to amend, for recusal, & to modify record, & denying def.'s mot. to strike post-trial proceedings.

7/28/99 #225 Notice of Appeal filed by plaintiff

7/29/99 - - Deliver to USCA 2 ctfd cpys of appeal and docet entries; 2 cpys of order & judgment

8/05/99 #226 Pla. statement of issues on appeal

8/06/99 - - notif. by Circuit Court of Appellate docket number 99-3059WMJC

9/11/00 #227 Ctfd, cpy of judg. & order from USCA affirming the decison odf the dist. ct.

11/27/00 #228 Motion by pla. for relief from judgment.

11/27/00 #229 Pla.'s sugg. in supp. of mot. for relief from judgment

12/04/00 #230 Pla. mt. for jud. notice

12/08/00 #231 Pla.' supp. sugg. in support of mt. for relief from judgment.

12/18/00 #232 Pla.'s supp. motion for relief from judgment.

1/22/01 #234 Motion by the Coalition for Justice for All for leave to file amicus curiae and brief

1/23/01 #233 Order by judge denying motions for relief from judgment, to amend, and for judicial notice

1/23/01 #235 Notice of Appeal filed by plaintiff

2/1/01 - - Delivered to USCA 2 ctfd cps of appeal and order denying rule 60 motion

2/07/01 - - Notif. by Circuit Court of App. dock. number 01-1328

3/09/01 #236 Order by judge granting motion by CFJFA for leave to file amicus curiae

4/09/01 #237 Ctfd. cpy. of judgm. from USCA affirming dec. of district court

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